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# No. 789

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

On Petition for Writ of Certiorari to the Supreme Court of Ohio

RAYMOND D. HOWELL,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

## BRIEF FOR RESPONDENT IN OPPOSITION

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## BRIEF FOR RESPONDENT IN OPPOSITION

## OPINION BELOW

The decision and opinion of the Supreme Court of Ohio is reported in 177 Ohio State 19 (1964) and is printed in Appendix A, infra, p. 18.

The journal entry of the Common Pleas Court of Marion County, Ohio, the Court of original jurisdiction, is unreported and is printed in Appendix A, infra, p. 17.

## JURISDICTION

The jurisdiction of this Court was invoked by Petitioner under 28 U.S.C. Sec. 1257 (3).

## QUESTION PRESENTED

Whether comment upon by counsel, and consideration as a circumstance by the court and jury of, a defendant's failure to testify, authorized by Article I, Section 10 of the Constitution of Ohio contravenes the privilege against compulsory self incrimination afforded by the Fifth Amendment.

## STATEMENT OF THE CASE

On November 22, 1962, an affidavit charging petitioner with violation of Ohio Revised Code Section 2905.10, which prohibits procuring a female under eighteen years of age for purposes of prostitution, harboring her in a house of assignation, or procuring her for intercourse with others, was filed by the Marion Police Department.

Petitioner, represented by Attorney George Roest, employed by petitioner, (as he was through his trial and all subsequent proceedings) was arraigned in Marion Municipal Court, entered a plea of not guilty, waived preliminary examination and was bound over to grand jury. Petitioner was released on bond throughout these proceedings.

On March 15, 1963, petitioner was indicted by the grand jury. On April 1, 1963 the cause came on for jury trial, and on the same date the jury returned a verdict finding petitioner guilty as charged under O.R.C., 2905.10.

On March 24, 1964, the Court of Appeals affirmed the conviction and on September 23, 1964 the Supreme Court of Ohio dismissed the appeal and affirmed the conviction.

Counsel for Defendant made no objection to closing argument by counsel for the State or to the charge of the Court, except a general objection.

On voir dire examination of the jurors, counsel for defendant stated that there would be some evidence that defendant has been convicted of misdemeanors in the past,

and does have a record, which will probably be brought out on testimony.

Also, in his opening statement, counsel for defendant stated the defense will show that there may be many things Mr. Howell has done.

The defendant did not testify during trial.

## SUMMARY OF RESPONDENT'S ARGUMENT

The provisions in Article I, Section 10 of the Ohio Constitution permitting comment upon, and consideration by court and jury of, a criminal defendant's failure to testify, does not contravene the Fifth Amendment privilege against self incrimination but rather is perfectly consistent with recognition of the privilege.

Since its first Constitution in 1802, Ohio has afforded to criminal defendants a privilege against compulsory self incrimination. Since the 1912 Amendment to Article I, Section 10 which added the above mentioned provision, Ohio has permitted comment by counsel upon, and consideration by the court and jury of, a defendant's failure to testify as consistent with the privilege. Both in Twining v. New Jersey, 211 U.S. 77 (1908) and in Adamson v. California, 332 U.S. 46 (1947), this court recognized that a state could reasonably conclude that a rule of law sanctioning comment upon a defendant's failure to testify was consistent with the privilege against self incrimination.

Nor does the fact that a no comment rule is followed in the federal courts mean that a preclusion from comment on a defendant s failure to testify is a necessary concomitant of the Fifth Amendment privilege. When this Court first pronounced the federal no comment rule in Wilson vs. United States, 146 U.S. 60 (1893), it predicated it not upon the Fifth Amendment but rather upon a statute which, while making a defendant competent to testify if he so re-

quested, declared his failure to testify was to create no presumption against him. The rule enunciated in WILSON was established by this Court in its supervisory rule over the federal courts and the statute there construed represented a legislative policy determination by Congress.

But a legislative policy determination regulatory of the federal courts should not be imposed by this Court upon the states as a constitutional mandate. Each state should be free, within the limitations of due process, to decide whether, as a matter of policy, it will permit, as consistent with the privilege, comment upon, and consideration by court and jury of a defendant's failure to testify.

While a large majority of the states have concluded that comment and consideration of a defendant's failure to testify should not be permitted, several states have concluded that such comment and consideration may and should be permitted.

And, certainly the decision by such states to permit comment and consideration cannot be characterized as illogical since, as a practical matter, juries will not be oblivious to the fact that a defendant does not testify.

## ARGUMENT

**The provision in Article I, Section 10 of the Ohio Constitution permitting comment upon, and consideration of, a defendant's failure to testify does not contravene the Fifth Amendment privilege against compulsory self incrimination.**

Petitioner attacks the constitutionality of the provision in Article I, Section 10 of the Ohio Constitution which permits comment upon by counsel, and consideration by the court and jury of, the failure of a defendant to testify. Since this Court has now held that the Fifth Amendment priv-

ilege against compulsory self incrimination is protected by the Fourteenth Amendment against abridgement by the states, Malloy v. Hogan, 378 U.S. 1 (1964), the question left unanswered by Adamson v. California, 332 U.S. 46 (1947), and Twining v. New Jersey, 211 U.S. 77 (1908), is squarely presented by this case, namely:

Is the privilege against compulsory self incrimination violated by the provision in the Ohio Constitution which authorizes comment upon and consideration of a defendant's failure to testify and explain or deny the evidence presented against him?

Ohio also has a statutory provision, Ohio Revised Code Section 2945.43, which provides:

> "On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise. The failure of such person to testify may be considered by the court and jury and may be made the subject of comment by counsel."

The language in the Fifth Amendment setting out the privilege against compulsory self incrimination, "No person . . . shall be compelled in any criminal case to be a witness against himself," is reflected verbatim in Article I, Section 10 of the Ohio Constitution. Since its first constitution in 1802, Ohio has recognized and afforded to criminal defendants the privilege against compulsory self incrimination so basic to the tradition of the Common Law. Ohio Const., Art. I, Section 10. Nor is the comment and consideration sanctioned by Ohio since the 1912 Amendment to Art. I, Section 10, inconsistent with recognition of the privilege against compulsory self incrimination.

Ohio has applied the 1912 Amendment, as well as O. R. C. 2945.43, since their enactment. Prior to the amendment Ohio had precluded comment on a defendant's failure to testify.

**A. The federal no comment rule is the product of statute, it does not follow necessarily from the Fifth Amendment privilege against compulsory self incrimination, and it should not be imposed by this court upon the states as a constitutional rule of law.**

When this Court first pronounced the federal no comment rule, it predicated it, not upon the Fifth Amendment, but rather upon a federal statute which, while conferring upon a defendant the right at his request to appear as a witness on his own behalf, also declared that his failure to so request "shall not create any presumption against him." Wilson v. United States, 149 U. S. 60 (1893); see also Bruno v. United States, 308 U. S., 287 (1939).

This statute upon which the federal no comment rule is predicated (28 U. S. C. Sec. 3481) represents a policy decision by Congress as to the manner in which the privilege against self incrimination is to be protected in the federal courts. Stewart v. United States, 366 U. S. 1, 2 (1961). But this legislative policy determination regulatory of the federal courts should not be imposed upon the states as a constitutional mandate. Cf. Ker v. California, 374 U. S. 23, 31-32 (1963).

In Twining v. New Jersey, 211 U. S. 77 (1908), this Court recognized that a state could, consistent with the privilege against self incrimination, allow comment upon a defendant's failure to testify when it said at page 114:

> "We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self incrimination. We do not intend, however, to lend any countenance to the truth of that assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself, and not a denial of it. The reasoning by which this view is supported will be found in the cases cited from New Jersey and Maine, and see Queen v. Rhodes (1899) 1

> Q. B. 77; Ex parte Kops (1894) A. C. 650. The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, we think that the exemption from compulsory self incrimination in the courts of the states is not secured by any part of the federal constitution."

Similarly in Adamson v. California, supra, while assuming for purposes of the decision that the comments sanctioned by the California procedure would, if it occurred in a Federal prosecution, infringe the defendant's privilege against self incrimination under the Fifth Amendment, this Court said in footnote 6 at 332 U. S. 50:

> "The California Law protects a defendant against compulsion to testify, though allowing comment upon his failure to meet evidence against him. The Fifth Amendment forbids compulsion on a defendant to testify. (Citations). A Federal statute that grew out of the extension of permissible witnesses to include those charged with offenses negatives a presumption against an accused for failure to avail himself of the right to testify in his own defense. (Citations). It was this statute which is interpreted to protect the defendant against comment for his claim of privilege. (Citations)."

That a rule precluding comment upon or consideration of a defendant's failure to testify is not a necessary consequence of recognition of the privilege against self incrimination is persuasively shown by the fact that nearly every state has felt compelled to treat specifically with the comment and consideration problem, either by constitution or statute. See generally, 8 Wigmore, Evidence (McNaughton Rev. 1961) Section 2272, p. 427, fn. 2. While a large majority of the states do follow a no comment rule, the decision to do so is is almost invariably predicated upon language, either in constitution or statute, which forbids comment upon a defendant's failure to testify, or forbids

that any presumption or inference be drawn from such failure to testify, or which declares that a defendant's failure to testify shall not prejudice him. Ibid.

Persuasive authority for the proposition that a rule sanctioning comment and consideration is not inconsistent with recognition of the privilege against self incrimination is also found in the decisions from those states which, while recognizing the privilege, do permit comment upon and/or consideration of a defendant's failure to testify.

Connecticut sanctions instructions to the jury on the failure of an accused to testify notwithstanding a constitutional provision that an accused shall not be compelled to give evidence against himself and a statute which provides that the neglect or refusal of the accused party to testify shall not be commented upon to the court or jury. State v. Hayes, 127 Conn. 543, 18 A. (2d) 895, 918-19 (1941). Connecticut also permits adverse inferences to be drawn from the defendant's failure to testify once the state has made out a prima facie case of guilt. State v. DelVecchio, 145 Conn. 549, 145 A. (2d) 199, 200 (1958).

Iowa, which has no constitutional provision specifically providing for the privilege against self incrimination, construes its due process provision as including the right against self incrimination. See e. g. Koonch v. Cooney, 244 Iowa 153, 55 NW (2d) 269, 271 (1952); State v. Height, 117 Iowa 650, 91 NW 935, 936-40 (1902). And, Iowa permits comment upon a defendant's failure to testify finding sanction for such procedure in an amendment to its statutory treatment of the problem which deleted language to the effect that a defendant's failure to testify should have no weight against him and should not be the subject of comment. State v. Ferguson, 226 Iowa 361, 283 NW 917, 918-19 (1939).

New Jersey, which also has no constitutional provision setting out a privilege against self incrimination, has treated the privilege as one of statutory origin. See State v. White, 27 N. J. 158, 142 A. (2d) 65, 70 (1958). Yet as consistent with recognition of the privilege, it follows a rule which permits, from the failure of an accused to testify, the drawing of an inference that he could not truthfully deny the inculpatory facts adduced against him. State v. Corby, 28 N. J. 106, 145 A. (2d) 289, 295 (1958).

New Mexico has a constitutional provision to the effect that no person shall be compelled to testify against himself in a criminal proceeding. New Mexico Const., Art. 2, Sec. 15. In deciding a question virtually identical to the one now confronting this court, the Supreme Court of New Mexico held that a court rule which sanctioned comment and argument upon the failure of an accused to testify does not violate and is not inconsistent with the constitutional privilege against self incrimination. State v. Sandoval, 59 N. M. 85, 279 Pac. (2d) 850, 852-53 (1955).

The Sandoval decision is representative of the realistic modern approach to this question. The Vermont Supreme Court in 1947 reached the same result after an extensive analysis and comment upon some earlier cases from other states which had reached a contrary result. State v. Baker, 115 Vt. 94, 53 A. (2d) 53, 56-63 (1947). Earlier the South Dakota Supreme Court by a 3-2 decision held that a statute sanctioning comment was violative of the privilege. State v. Wolfe, 64 S. D. 178, 266 NW 116 (1936). The New Mexico court in Sandoval found the South Dakota dissents persuasive. In an advisory opinion the Massachusetts Supreme Court, with one dissent, reached the same result as the South Dakota Court. In re: Opinion of the Justices, 300 Mass. 620, 15 NE (2d) 662 (1938).

California has a specific constitutional provision which permits comment and consideration which goes simply to the weight which may be afforded to evidence presented in the case against the Defendant which he fails to explain or deny by his testimony and the failure of a defendant to testify is not affirmative evidence of any fact. Adamson v. California, 332 U. S. 46, 55-58 (1947); People v. Adamson, 27 Calif. (2d) 478, 488-92, 165 Pac. (2nd) 3, 8-10 (1946); People v. Ashley, 42 Calif. (2d) 246, 268-69, 267 Pac. (2d) 271, 285 (1954).

Further, authority for the proposition that comment upon and consideration of a defendant's failure to testify is not inconsistent with the privilege against compulsory self incrimination is found in the Uniform Rules of Evidence and in the Model Code of Evidence, both of which sanction comment upon and consideration of the failure of an accused to testify. Uniform Rules of Evidence, Rule 23 (4) (1953); Model Code of Evidence Rule 201 (3) (1942).

We submit that the decision as to whether or not comment and consideration is to be permitted as to a defendant's failure to testify is a policy determination which each state should be free to resolve within the bounds of due process and that a preclusion from such comment and consideration is not necessary to compliance with the Fifth Amendment privilege against self incrimination.

**B. The comment and consideration sanctioned by the Ohio Constitutional provision goes only to the weight of the evidence presented against a defendant.**

Ohio has a specific constitutional provision setting out the privilege against self incrimination which also sanctions consideration by the court and jury and comment by court and counsel upon the failure of the accused to testify. Ohio Const., Art. I, Sec. 10. This sanction for consideration and comment which is also provided for by statute has

received the approval of the courts of Ohio. Cleveland v. McNea, 158 O. S. 138 (1952); Long v. State, 109 O. S. 77, 92-93 (1923); Leonard v. State, 100 O. S. 456, 472 (1919); State v. Morrow, 90 O. S. 202 (1914); State v. Parks, 105 O. App. 208 (1957); Cincinnati v. Hyams, 77 O. App. 403 (1945); Halsey v. State, 42 O. App. 291 (1932).

The opinions of the Courts in the above cited Ohio cases, where the question of comment has been raised on appeal, refer to such comment in relation to defendant's failure to testify in view of the overwhelming, damaging and incriminating evidence that had been presented. Cleveland v. McNea, supra; Long v. State, supra; Cincinnati v. Hyams, supra.

However, the comment authorized by the Constitution does not contemplate or permit a substitution of argument for evidence or the introduction of evidence by argument. Ross v. State, 35 O. App. 539, 172 N.E. 618.

The Court, in the present case, charged

> "and in order to convict the defendant on trial, the prosecution must establish his guilt by the evidence beyond a reasonable doubt." (R-48).

Silence of an accused, or comment thereon, furnishes none of the affirmative evidence to establish the elements of an offense.

In United States v. Bagland, 306 F (2d) 782 (1962), the question of comment by the prosecution was raised on the appeal. The conviction was affirmed by the Circuit Court of Appeals. This Court denied certiorari. [9 L. Ed. (2d) 498, (1963)]. In the opinion we find the following language:

"The jury need not entirely disregard defendant's failure to explain highly suspicious circumstances, and if evidence is sufficient to support inference of guilt and defendant fails to offer reasonable explanation consistent with innocence, failure may be considered."

"Nevertheless, protection of those fundamental rights does not mean that the failure of the defendant in a criminal case to explain highly suspicious circumstances, must be entirely disregarded by the trier of fact."

U. S. v. Ragland, 306 F (2d) 732 (1962); cert. denied 9 L. Ed. (2d) 498.

See also: Moore v. U. S. 271 F (2d) 564 (1959)
Wilson v. U. S. 162 U. S., 613, 40 L. Ed. 1090 (1896)
Jenkins v. U. S. 58 F (2d) 556 (1932)
Crawley v. U. S. 268 F. (2d) 808 (1959)

In Shott v. Tehan, an Ohio case, appellant was convicted of violation of the securities law. Appellant did not testify and on appeal raised the question of the prosecution's comment upon the failure to testify. This Court dismissed the appeal but treated the same as an application for writ of certiorari, which was denied. 373 U. S. 240, 10 L. Ed. (2d) 409 (1963). A petition for rehearing was likewise denied. 374 U. S. 858, 10 L. Ed. (2d) 1082 (1963).

**C. Such comment is to a patent fact which the jury inevitably considers.**

That an innocent person when confronted by an accusation will tender a denial and protest his innocence is basic fact of human nature which has found expression in our system of law in many ways. Long before any question of the propriety of comment on a defendant's failure to testify had arisen, the law recognized as part of the admission exception to the hearsay rule, silence or equivocal conduct by a person confronted with an accusation. See generally, 4 Wigmore, Evidence (3d Ed. 1940) Sec. 1071, p. 70.

This concept also finds expression in the rule followed in both civil and criminal cases which permits, from the failure of a party or a defendant to produce evidence which it lies within his power to produce, the drawing of an in-

ference that the facts are unfavorable to his cause. Mammoth Oil Co. v. United States, 275 U. S. 13, 51-52 (1927); Local 167 v. United States, 291 U. S. 293, 298 (1934); Interstate Circuit v. United States, 306 U. S. 208, 225-26 (1938); see generally, 2 Wigmore, Evidence (3d Ed. 1940) Secs. 285-91; 8 Wigmore, Evidence (McNaughton Rev. 1961) Sec. 2273.

Of similar origin is the generally accepted rule of evidence which allows adverse inferences to be drawn when a party to a civil suit fails to testify and contravert evidence which has been presented against him concerning matters presumptively within his knowledge. Snead v. United States, 217 F. (2d) 912, 913-14 (4th Cir. 1954), Cert. denied 348 U. S. 971 (1955); United States v. Leveson, 262 Fed. (2d) 659, 661 (5th Cir. 1959); United States v. DeLucia, 163 F. Supp. 36, 41 (N. D. Ill. 1957), Aff'd 256 F. (2d) 487 (7th Cir. 1958), Cert. denied 358 U. S. 836, Rehearing denied 358 U. S. 896. See generally, 8 Wigmore, Evidence (McNaughton Rev. 1961) Sec. 2272 (1) (e), p. 439.

And, even under the Federal no comment rule, a defendant in a criminal case who does take the stand may not stop short in his testimony and omit to explain incriminating circumstances and events in evidence against him without subjecting his silence in that regard to the comments and inferences which become appropriate. Caminetti v. United States, 242 U. S. 470, 492-95 (1917).

Recognizing the universal acceptance of the concept that silence in the face of accusation is indicative of guilt, it would be illogical to conclude other than that the fact a defendant fails to testify will be noted by the jury and that the jury will draw certain inferences from that fact. See United States v. DiCarlo, 64 F. (2d) 15, 18 (2d Cir. 1933); State v. Cleaves, 59 Me. 298, 8 Am. Rep. 422, 423 (1871); Parker v. State, 61 N. J. Law 308, 39 A. 651, 653-54

(1898); State v. Baker, 115 Ver. 94, 53 A. (2d) 53, 59-62 (1947).

Indeed, to find in the Fifth Amendment a rule which would preclude triers of fact from considering so significant a fact would be to demean the Constitution and to place it at odds with common sense. As Justice Frankfurter observed while concurring in the Adamson case:

> "Only a technical rule of law would exclude from consideration that which is relevant, as a matter of fair reasoning, to the solution of a problem. Sensible and just minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and right minded men do every day violates the 'immutable principles of justice' as conceived by a civilized society is to trivialize the importance of 'due process' ". 332 U. S. at 60-61.

**D. Assuming for argument that comment upon a defendant's failure to testify or explain evidence presented against him is barred by the Fifth Amendment, petitioner has shown no prejudice meriting reversal.**

Should this Court now conclude that comment upon defendant's failure to explain or deny by his testimony evidence presented against him is barred by the Fifth Amendment privilege against self incrimination, it cannot be said after a consideration of the record below and the overwhelming evidence of petitioner's guilt that he was prejudiced by the prosecutor's comments or by the court's instruction. See Coleman v. Denno, 223 F. Supp. 938, 944-45 (D. C. S. D.—N. Y. 1963), Aff'd 330 F 2d 441 (2d Cir. 1964), Cert. denied 377 U. S. 1003. U. S. v. Ragland, 306 F (2d) 732 (1962); cert. denied 9 L. Ed. (2d) 498.

The petitioner raises no question as to his conviction on the evidence but asserts only prejudicial error in the charge of the court and comment by counsel.

No specific objection was made to the argument of counsel for the state during argument nor to the charge of the court referring to defendant's failure to testify.

However, on voir dire examination of the jury, counsel for petitioner asked the jurors the following final question:

"There will be some evidence that Mr. Howell (defendant) has been convicted of misdemeanors in the past, and does have a record, which will probably be brought out in testimony. Is there anyone here who believes if a man has been convicted of things in the past he should be convicted on his past record? Is there anybody who feels that way?"

And in his opening statement to the jury, counsel for defendant stated:

". . . The defense will show that there may be many things Mr. Howell has done but he is charged with this particular charge . . ."

Based upon the record, we submit that defendant was not prejudiced by the comment or charge.

## CONCLUSION

The case of Malloy v. Hogan, 378 U. S. 1 (1964) involved a refusal to answer questions, resulting in contempt proceedings and imprisonment. The present case concerns comment on failure to testify. In the Twining and Adamson cases, supra, this Court assumed without deciding or lending any countenance to the truth of the assumption that comment on the failure to testify would infringe the privilege against self incrimination.

Valid distinctions can be drawn between subjecting the accused to an inference of guilt for refusing to testify and

physically forcing him to testify by use, for example, of the contempt power. The contempt power punishes the defendant for silence itself, before there has been any finding of guilt. Comment, on the other hand, uses silence only as a circumstance of guilt, and punishes the defendant, if at all, only for the substantive offense with which he is charged.

We would submit that a difference exists between the specific provisions of the Bill of Rights and the uncertain demands of due process, which this Court has hitherto considered on a case-by-case basis. The two tests might require the same result in the area of coerced confessions, and due process requirements would prevent a state from direct compulsion of incriminating testimony. However, under our system of federalism, which should recognize relevant differences existing between state and federal criminal law enforcement, compelled uniformity of standards between state and federal assertion of a federally guaranteed right is questioned by many authorities. We submit that the Court could properly interpret the Fifth Amendment privilege as a prohibition only against using either physical abuse or the contempt power to force the defendant to speak.

For the foregoing reasons set forth in this brief, respondent respectfully urges that the conviction be affirmed and the petition be denied.

Dated, Marion, Ohio,
January ...., 1965.

Robert O. Stout,
Prosecuting Attorney,
Marion County, Ohio.

## APPENDIX

### Journal Entry of the Court of Common Pleas of Marion County, Ohio.

On the 18th day of March, 1963, the Defendant, Raymond D. Howell, was arraigned in open Court upon the Indictment as returned by the Grand Jury of Marion County, Ohio, January Term, 1963, at which time the Defendant, in the presence of his attorney, George Roest, acknowledged receipt of a copy of the Indictment on March 15, 1963, waived the reading thereof and entered a plea of "Not Guilty" to the charge as contained in the Indictment, it being returned under Ohio Revised Code 2905.10.

Thereafter, this cause came on for trial on April 1, 1963, pursuant to the former orders of this Court, the Defendant, Raymond D. Howell, being brought into open Court in the presence of his attorney, George Roest, and the Prosecuting Attorney, Robert O. Stout, being present in Court.

Thereupon, the venire was called by the Clerk of said Court. According to the records of said Court the following persons were seated as jurors in the above entitled case, duly empaneled and sworn: Harry E. Koch, Richard Wedertz, Agnes Burkhart, Jean Plumley, Mildred Carwile, Mae Felton, Mary M. Wettergreen, Kay E. Mahaffey, Granville A. VanScoy, Earl W. Warwick, Alva F. McClenathan and William S. Guthery.

An alternate juror, Hilda V. Byrd, was duly empaneled and sworn.

Persons called as prospective jurors were excused for cause, by the Court, according to the record in this case, and those persons challenged peremptorily by the State of Ohio, and the Defendant, were released according to the record.

Thereupon, the trial proceeded according to law, until the case was finally submitted to the Jury on April 1, 1963, at which time the alternate juror was excused. Motions were made in the case and either sustained or overruled at the time as shown by the record in this case.

On the 1st day of April, 1963, the following Verdict, in writing, was returned by the Jury, which read in the manner following:

"VERDICT
(Guilty)

COURT OF COMMON PLEAS,
MARION COUNTY, OHIO

THE STATE OF OHIO — Offense:
vs. — No. 4423
RAYMOND D. HOWELL — R. C. 2905.10

We, the Jury in this case, find the Defendant, Raymond D. Howell, Guilty of the offense as charged in the Indictment.

Each of us said jurors signs his name hereto this 1st day of April, 1963.

1. Harry E. Koch
2. Richard Wedertz
3. Agnes Burkhart
4. Jean Plumley
5. Mildred Carwile
6. Mae Felton
7. Mary M. Wettergreen
8. Kay E. Mahaffey
9. Granville. A. VanScoy
10. Earl W. Warwick
11. Alva F. McClenathan
12. William S. Guthery
Foreman."

The Defendant, having been present with his attorney in open Court at the time said Verdict was returned and read, the Court thereupon inquired of the Defendant whether he had anything further to say before sentence was passed, and having nothing to say but what he had

already said, and showing no good and sufficient reason why judgment should not be pronounced,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant, Raymond D. Howell, upon his conviction of "Guilty" upon the charge as contained in the Indictment, it being under R. C. Sec. 2905.10, be and hereby is sentenced to be imprisoned in the Ohio State Penitentiary at Columbus, Ohio, for a period of not less than one (1) nor more than five (5) years. IT IS FURTHER ORDERED that pending any appeal or motion for new trial, the bond for the appearance of the Defendant at all future times as may be set by the Court, is hereby set in the amount of $2500.00.

Costs assessed to Defendant.

**Ohio Constitution (Pertinent Portion)**

"* * * No person shall be compelled in any criminal case to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel * * *." Ohio Constitution Article I, Section 10.

**Order of the Supreme Court of the State of Ohio, Dismissing the Appeal.**

(Filed September 23, 1964.)

This cause, here on appeal as of right from the Court of Appeals for Marion County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Marion County for entry.